

U.S. Department of Labor

Office of Administrative Law Judges
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.....
In the Matter of

GERALD FISH,
Complainant,

Date Issued: *June 27, 2001*

Case No.: 2000-STA-56

v.

H and R TRANSFER,
Respondent.
.....

RECOMMENDED DECISION AND ORDER

Gerald Fish ("Complainant") filed a complaint with the Department of Labor on or about April 13, 2000 alleging that H & R Transfer ("Respondent") terminated his employment in violation of section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305 ("STAA"). The Regional Administrator of the Occupational Safety and Health Administration in Denver, Colorado, issued his determination on July 11, 2000 for the Secretary of Labor, that Complainant's complaint did not have merit.

Complainant filed a written objection to the Regional Administrator's determination on August 17, 2000 and requested a hearing before the Office of Administrative Law Judges.

A hearing was set for October 3, 2000 in Fargo, North Dakota. Complainant, by letter dated September 11, 2000, requested that this hearing be continued until December 5, 2000. The Complainant's motion was granted and the hearing was rescheduled for December 5 and 6, 2000. It was later rescheduled for December 12 and 13, 2000.

Complainant and Respondent filed post-hearing briefs on March 6, 2001¹.

¹On March 6, 2001, Complainant's filed a *Motion to Accept Brief with Late Postmark*.. In support of this motion, Complainant states that he was involved in a wrongful death case from February 27, 2001 until March 2, 2001, the date on which the brief in this case was supposed to be postmarked. Counsel for the Complainant adds that while he did not meet the March 2, 2001 deadline, he served

Findings of Fact

Complainant, Gerald Fish, a resident of Audobon, Minnesota, was employed by Respondent from on or about September 15, 1998 until March 20, 2000 driving a commercial motor vehicle between Minnesota and Montana or Idaho, with occasional trips to Michigan and Washington state (Tr. 6). At the time Complainant began working for Respondent, he was assigned a 1993 Freightliner tractor trailer. Complainant operated this vehicle until September 28, 1999 when he was assigned a 1992 Freightliner truck tractor (Tr. 119). He drove the 1992 Freightliner until the date his job was terminated. *Id.* Both motor vehicles have a gross vehicle weight rating of over 10,000 pounds. (Stipulation)

Respondent is a corporation owned by Ron Ristvedt and Roger Hagen, with a principal place of business at 6805 44th Avenue, Fargo, North Dakota. (Stipulation) Respondent is engaged in interstate commerce through its commercial motor vehicle operation and is an employer within the meaning of the Act. (Stipulation) Respondent contracted truck tractors to Sheyenne Transport which, in turn, dispatched the vehicles with driver to certain destinations for pickups and deliveries (Tr. 14, 343).

Beginning in June 1999 and continuing until his termination on March 20, 2000, Complainant submitted to Respondent numerous written and verbal requests and complaints regarding the operational condition of his assigned truck tractor and trailer. Those complaints described exhaust leaks, worn tires, defective brakes, worn steering system parts, fluid leaks, incorrect permits, and other safety related problems (CX 1,2,6,7-12,15-19,21-27, 29). Between September 1998 and March 2000, Respondent spent over \$24,000 for repairs on Complainant's assigned vehicles (RX 2,3). In addition, Complainant performed routine maintenance when necessary, as exemplified in January and February 2000 when he purchased oil and coolant (Tr. 25 and RX 9)².

the brief by Express Mail on March 4, 2001. Respondent has not objected to this motion. Complainant's *Motion to Accept Brief with Late Postmark* is granted and the brief is accepted.

²Complainant was required by Respondent to conduct routine maintenance checks and insure that all fluids were maintained at the appropriate levels when traveling between pickup and delivery locations. In fact, while on the road, Complainant exhaustively inspected his assigned truck tractors and trailers daily, spending between one-half hour to one hour conducting safety and maintenance checks (Tr. 52). He checked engine fluid levels, inspected tires, lights, suspension, brakes, steering, and other critical components of his assigned truck (Tr. 24-25). Complainant was also under instructions to return to Fargo for routine maintenance and repair (Tr. 376). If, however, Complainant experienced a critical maintenance problem while on the road, the necessary repairs could be made away from Fargo provided that the Complainant obtained prior approval (Tr. 376).

When Complainant was hired he was informed by Ristvedt that Respondent needed him to drive approximately 10,000 miles per month on the average in order to generate sufficient revenue to make operating the truck profitable. Complainant's mileage dropped below 10,000 miles in July 1999, prompting a September 14, 1999 meeting with Ristvedt wherein Complainant was told by Ristvedt that he had to increase his mileage and become more consistent with the mileage driven. (Tr. 162, 226, 348) Complainant's mileage again dropped in November and December of 1999 to levels of about 8,500 miles per month (Tr. 349, 350). On December 21, 1999, Ristvedt again emphasized to Complainant that his mileage must increase above 10,000 miles a month (Tr. 168-178, CX18). After this frank conversation, Complainant's mileage increased, and he drove well over 10,000 miles a month in January and February 2000 (Tr. 302, 352).

During a December 21, 1999 conversation with Ristvedt, Claimant referred to Hagen as an (expletive) liar (CX 18), and on March 10, 2000, Complainant sent a fax to Ristvedt accusing Ristvedt of trying to force him to quit his job by not accommodating his physical and mental disabilities and manipulating his dispatches so as to prevent him from returning home to see his family (CX 24). Complainant's fax also complained that dispatches in February "could not be legally logged" and that his truck tires were bald "but remain unattended." *Id.*

Complainant returned his truck to Respondent's shop in Fargo, North Dakota, on March 17, 2000, a Friday afternoon, for routine maintenance. Hagen intended to meet with the Complainant at that time to terminate his employment. However, Hagen missed him as Claimant left the maintenance shop without speaking to anyone (Tr. 411). The following Monday, March 20, 2000, Complainant called Sheyenne Transport to obtain his upcoming dispatches. Complainant was told to contact Hagen (Tr. 204). Upon calling, Complainant was told by Hagen that he was fired. Hagen explained:

"And here's the reasons: we're tired of getting these abusive letters and the attitude and you're difficult to work with and taken the way you take care of the truck and your poor performance" (Tr. at 204-206; CX30).

Complainant asked what he hadn't taken care of on the truck. Hagen replied "Well, it's just plain filthy, Gerald. I mean, the thing looks like it's never been cleaned." (Tr. 205-206, CX 30). Complainant replied that he had "cleaned the inside before [he] left." *Id.* Hagen rebuffed his reply, stating "[the truck] is a disaster." *Id.* Complainant then asked whether Hagen was referring to the inside or outside of the truck. Hagen answered that he was referring to the inside. *Id.* Hagen told Complainant to go to the shop, get all his personal items, and hand in all the necessary paperwork so he could receive his last paycheck. *Id.* Complainant agreed to do so. *Id.*

While Complainant's truck remained with Fargo Freightliner, it was serviced with an oil change

and Respondent discovered that the truck was over 4 gallons low on oil (Tr. at 367, 405, 434-435).³

Prima Facie Case

Section 405 of the STAA was enacted in 1983. This legislation is intended to promote safety of the highways by protecting employees from disciplinary action because of an employee's engagement in protected activity. 49 U.S.C. § 31105.

In a case brought under section 405(a), the initial burden is on the Complainant to establish a *prima facie* case of retaliatory discharge. To do so, Complainant must establish: (1) he was engaged in protected activity under the STAA; (2) he was the subject of adverse employment action and the employer was aware of the protected conduct when it took the adverse action; and (3) there was a causal link between his protected activity and the adverse action of his employer. Once Complainant establishes a *prima facie* case, raising the inference that the protected activity was the likely reason for the adverse action, the burden shifts to Respondent to demonstrate a legitimate non-discriminatory reason for its action. Even if Respondent demonstrates such a reason, Complainant may prevail by showing that the stated reason was pretextual. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). If, however, the trier-of-fact decides that there were "dual motives" for the adverse action, that is, that the employer's action was motivated by both an illegal motive and a legitimate management reason, the employer may prevail only by showing by a preponderance of the evidence that it would have taken the same action even if the employee had not engaged in the protected activity. *Palmer v. Western Truck Manpower*, 85-STA-6, (Sec'y 1987).

Protected Activity

Section 405(a) of the Act states in pertinent part that:

(a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because -

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

(B) the employee refuses to operate a vehicle because-

³The mechanic informed Ristvedt that the engine was two gallons low on water and no oil was on the dipstick. Hagen testified that the mechanic later informed him that the truck was six gallons low on oil. However, on cross examination, the mechanic admitted that the engine was actually only about 4 gallons low on oil since the two oil filters hold about one gallon of oil each (Tr. 367, 405, 434-435, 442).

- (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
- (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

Subsections (1)(A) and (1)(B) of the foregoing provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. See *LaRosa v. Barcelo Plant Growers, Inc.*, ARB Case No. 96-089, ALJ Case No. 96-STA-10, Rem. Ord., Aug 6, 1996, slip op. at 1-3. Complainant must prove that he engaged in activity protected by either or both of the foregoing provisions, and that he was terminated, at least in part, because of that protected activity. *Somerson v. Yellow Freight System*, ARB Case No. 99-004, ALJ Case No. 98-STA-9, Final Dec. and Ord., Feb. 18, 1999, slip op. at 8, (citing *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Byrd v. Consolidated Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, Final Dec. and Ord., May 5, 1998, slip op. at 4 n.2).

Complaints are protected activities if they relate to federal commercial motor vehicle laws and regulations. *Moravec v. HC&M Transportation, Inc.*, 90-STA-44 (Sec'y July 11, 1991). The complaint does not have to state the specific rule or regulation that it pertains to. *Id.* In addition a complaint is protected whether it was formally filed with a government agency or internally communicated to the employer. *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998). The complaint need not be meritorious as long as the complainant can show that he reasonably believed he was complaining about an actual violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Here, Complainant argues that he engaged in protected activity when he made oral and written complaints to Respondent related to commercial motor vehicle safety regulations during the operation of his vehicle, when he complained to Ristvedt on December 21, 1999 about his inability to drive the number of miles demanded by Ristvedt, and when he submitted inspection requests to the Montana Highway Patrol on October 1, 1999 and on November 11, 1999.

Between June 14, 1999 and March 14, 2000, Complainant made the following complaints about safety related problems with his vehicle:

June 14, 1999 - Told Hagen that two tires on the trailer had steel belts exposed (Tr. 93).

June 28, 1999 - Fax to Respondent stating that tires on trailer were worn through, exposing two layers of steel (CX 1).

September 14, 1999 - Complaint to Ristvedt about rusted exhaust pipe and problems with ball joints and U-joint in steering system (Tr. 100).

September 26, 1999 - Letter to Respondent stating that he would have to falsify logs to drive 12,000 miles a month as required by Respondent (Cx 2).

September 28, 1999 - Complained to Hagen about a worn U-joint in steering system (Tr. 112, 113).

October 1, 1999 - Telephoned Hagen to report receiving a ticket from Montana State Patrol for exhaust leak from tractor (Tr. 110, 111).

October 6, 1999 - Fax sent to Respondent listing items that needed servicing including defective ball joint in steering , antifreeze leak near heater, transmission fluid leak and lube oil leak. (CX 5).

October 20, 1999 - Fax sent to Ristvedt suggesting a need to repair fuel leak, loud muffler, trailer marker lights, defective indicator light, clunk when turning and worn out drag line joint (CX 6, Tr. 121-124).

Late October, 1999 (after Oct. 26) - Letter to Respondent complaining about steering, i.e., excess play, pulling to right of road and clunking sound, radiator tube and hose missing, and leaking exhaust (CX 7, Tr. 124-128).

November 7, 1999 - Certified letter to Ristvedt in which Complainant recapped problems he had with truck in October including steering, exhaust leak, engine overheating and poor brakes (CX 8, Tr. 128-138).

November 9, 1999 - Fax to Hagen of repair needs, including steering with play and pulling to right, relief tube on radiator needing replacement, and clunking noise from suspension (CX 9, Tr. 134-136).

November 12, 1999 - Fax to Ristvedt complaining about some repairs not having been made, and that period of time truck was in shop hindered him from making delivery and loading appointments and required him to "drive illegally" (CX 10, Tr. 137-139).

November 15, 1999 - Fax to Respondent of repair needs including defective steering, visible tire wear, defective or missing jam nuts on brakes, and hanging wires that operate brake lights (CX 11, Tr. 140-143).

November 15, 1999 - Telephone conversation with Ristvedt in which he complained about steering problems (CX 12, Tr. 147, 150).

November 16, 1999 - Drove tractor to Montana Highway Patrol Station to show them the

repair list he had faxed to Respondent on November 15, and insisted that the tractor be inspected. The Highway patrol gave Complainant an out-of-service ticket (CX 11, Tr. 142, 143).

November 16, 1999 - Telephone conversation with Hagen in which he complained about steering driveline (CX 14, Tr. 160).

November 28, 1999 - Letter to Respondent complaining about steering problems and asserting a mental disability that needs to be accommodated by not being pressured into dishonesty on log books (CX15, Tr. 161-163).

November 30, 1999 - Fax to Hagen with a diagram showing problems with the exhaust. The fax also listed other problems such as a loose air hose, fuel leak, leaking wheel seal, antifreeze leak, defective tire and a defective button that applied spring brake (CX 16, Tr. 164-166).

December 21, 1999 - Telephone conversation with Ristvedt wherein he complained about number of miles he was expected to drive (CX 18, Tr. 170-179).

December 22, 1999 - Fax to Respondent of a repair list to be taken care of when tractor was in shop on December 23, 1999. The list included exhaust leak, loose hose on differential, fuel leak, seal leak on trailer axle, air leak from braking system, steel belts exposed on tire, air leak from spring brake, and broken tire chains (CX 19, Tr. 180-185).

January 14, 2000 - Fax to Respondent of list of repairs to be taken care of when tractor was in shop on January 15, 2000. List included steering pulling to left, flat tread on tire, defect on trailer brakes (CX 21, Tr. 189-190).

February 3, 2000 - Fax to Respondent of list of repairs to be taken care of when tractor was in shop on February 4, 2000. List included right steer tire, inside trail tire, shock leak, and air leak from break system (CX 22, Tr. 190-191).

March 3, 2000 - Fax to Respondent of list of repairs to be taken care of at shop on March 3, 2000. List included left windshield, worn trailer tire, lights and wiring (CX 25, Tr. 199).

March 10, 2000 - Fax accusing Ristvedt of attempting to force Complainant to quit by denying accommodation for physical and mental disability and changing routes so Complainant could not get home in February. Fax also complained about bald tires (CX 24, Tr. 196-199).

March 13, 2000 - Fax to Respondent that tractor would be in Fargo on March 14, 2000 and questioned whether he should stop at shop for oil change, tire replacement, marker light repair and tarp repair (CX 26, Tr. 200-201).

March 14, 2000 - Fax to Hagen that he was authorized to drop tractor off at shop that night. Repairs suggested included brakes, jam nut, tires, marker lights, wind shield chips and clutch (CX27, Tr. 200-201).

The aforesaid written and oral communications from Complainant all relate to vehicle safety concerns governed by the Federal Motor Carrier vehicle safety regulations. Vehicle operation with worn tires is governed by 49 C.F.R. § 393.75; fatigue or lack of rest is governed by § 393.2; falsification of logs is governed by § 395.8(e)(7); worn or faulty universal joints is governed by § 393.209; oil and grease leaks or improper lubrication is governed by § 396.5; poor wiring connections are governed by § 393.27; leaks from exhaust system is governed by § 393.83(g); steering that does not turn freely is governed by § 393.209(d); excess hours of driving is governed by § 395.3(a); and generally, the operation of a vehicle likely to cause an accident or breakdown is precluded by § 396.7

Respondent acknowledges that some of the Complainant's complaints would "probably" constitute protected activity, particularly the two requests for inspections to the Montana Highway Patrol because of Complainant's concerns about the exhaust system and the steering. Nevertheless, Respondent argues that most of Complainant's complaints can not be considered as protected activity, since in reality, they were not complaints, but simply requests for service made in the ordinary course of the trucking business. Respondent does not cite authority for the proposition that requests for service of malfunctions that could impose safety hazards can not be considered as protected activity. Moreover, the requests for service can not be isolated or distinguished from the other communications, oral and written, during the period June, 1999 to March, 2000 regarding the condition and safety of his tractor and trailer and his concerns that he was being required to drive a number of hours in excess of those permitted by federal motor vehicle safety regulations. All of those twenty-six communications, oral and written, considered together, constitute a pattern of protected activity.

Adverse Employment Action

Complainant suffered an adverse action when his job with Respondent was terminated by Hagen on March 20, 2000. Hagen was aware of Complainant's complaints about the condition and safety of the tractor and trailer he was driving and his concerns that he was being asked to drive an excessive number of hours.

Causal Link Between Adverse Action and Protected Activity

Complainant has not produced any direct evidence that he was fired because he reported safety problems with his vehicle, refused to drive more miles than allowed under federal regulations, or otherwise engaged in protected activity. However, in establishing a *prima facie* case, Complainant need only raise the inference that his engaging in protected activity caused the adverse action. *Stiles v. J.B. Hunt Transportation, Inc.*, 92-STA-34, (Sec'y 1993). The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of

a *prima facie* case. *Deeneway v. Matlack, Inc.*, 88-STA-20, (Sec'y June 15, 1989).

Complainant's employment was terminated by Respondent on March 20, 2000. His request to the Montana Highway Patrol for an inspection of his tractor occurred in October and November of 1999, about four months prior to his termination, and his complaints to Respondent about safety related mechanical difficulties with his truck occurred as recent as thirty days prior to his termination. This proximity of Complainant's termination to his protected activity establishes a causative relationship between the two for the purpose of establishing a *prima facie* case.

Respondent's Defense

If the Complainant establishes a *prima facie* case, the burden shifts to the Respondent to rebut the presumption of disparate treatment by producing evidence establishing that the Respondent's action was motivated by nondiscriminatory reasons. However, the Respondent need only produce this evidence, the ultimate burden of persuasion is on the Complainant to show the action against him was discriminatory. *McGavock v. Elbar, Inc.*, 86-STA-5, (Sec'y 1986).

Respondent asserts that it did not terminate Complainant because of protected activity but for legitimate non-discriminatory reasons. Ron Ristvedt is president of the Respondent company and a fifty percent owner. He described the operation of his business as leasing truck and trailers and providing drivers to a carrier that has the authority to pull the freight (Tr. 341). Ristvedt and the other fifty percent owner, Roger Hagen, made the decision to terminate Complainant's employment (Tr. 399). Both Ristvedt and Hagen testified that Complainant was terminated because he was uncooperative, had a bad attitude, performed inconsistently and did not properly care for the vehicle he was driving (Tr. 368, 299, 403).

Inconsistent Performance

Ristvedt testified that at about the time Complainant was hired he discussed with Complainant the rate of pay, as well as how to handle paperwork, the repair and maintenance of the equipment he was driving, and the number of miles Complainant was expected to drive, on the average about 10,000 miles per month (Tr. 344, 345). On at least two occasions, in August and December, 1999, Ristvedt talked to Complainant about increasing the number of miles he was driving, as otherwise Respondent would not be able to earn a profit from the vehicle (Tr. 347, 348). Complainant's driving averaged about 10,000 miles per month from October 1998 through June, 1999 but decreased in July to 9618 miles, prompting the August discussion (RX 9). The number of miles Complainant was driving increased again in August, September and October to the 10,000 range but decreased in November and December to 8100 and 8500 miles, respectively *Id.* The low mileage prompted a December 21, 1999 telephone call from Ristvedt to set up a meeting to discuss Complainant's driving distance (CX 18).

Attitude

Complainant had an antagonistic attitude toward Ristvedt and Hagen that was expressed both in his face to face dealings and written memos. The December 21, 2000 telephone conversation with Ristvedt exemplified his attitude. Complainant's response to Ristvedt's request for a meeting was that he did not want to waste his time meeting with Ristvedt; if he was to meet, he wanted paid for his time (CX 18, p. 2). He also expressed impatience with discussing his performance over the phone. The conversation, which was taped by Complainant, was carried on as follows:

Ristvedt: ...I think when we - when you get in - we should probably visit a little bit.

Complainant : Ah, I don't know why we can't discuss this on a phone. I don't like head-to-head talks like that.

Ristvedt: Well you know, I think were going to have to, anyway, you know.

Complainant : Well, what do you want to talk about. I'm pulled off the road here in Illinois - I'm taking time out of this run to talk to you.

Ristvedt: Yeah, but ah, you know I just want to discuss some other stuff with you, that's all.

Complainant : Well, let's discuss away, I'm waiting here for my supper.

Ristvedt: Yeah, well, go ahead and eat your supper. You know - I don't want to discuss anymore on the telephone.

Complainant : Well, are you paying me for my time if I come into your office?

Ristvedt: No.

Complainant : Well then I'm not going to waste my time Ron.

Ristvedt: You know - that's - I need to discuss some stuff with you.

Complainant : Yeah, but you're using my time. I'm gone from home all the time.

(CX 18, p.2)

Complainant did meet with Ristvedt on December 21, 2000. Complainant tape recorded the meeting. The meeting started with Complainant expressing impatience with being there and that a

meeting with Ristvedt was a waste of his time. “Well it’s time Ron. You wanted to talk to me, I’m hear (sic). I don’t want my time wasted...You guys seem to think that you can just waste a person’s time.” Ristvedt expressed disappointment that Hagen couldn’t be at the meeting. Complainant responded that it was no point in him talking to Hagen as Hagen was nothing but a [expletive] liar (CX 20).

Ristvedt and Hagen both testified that there were other occasions when Complainant refused to meet with them. Hagen testified that when Complainant brought his truck in, he would never stop; he would fax a statement of the repairs he wanted performed, but wouldn’t stop himself. Hagen’s request for Complainant to stop would be met with a refusal to stop and talk as he was on his “own time” (Tr. 402). Hagen offered the opinion that part of Complainant's ordinary job duties was discussing with him or a repairman the performance of the truck or his own performance as a driver *Id.*

Hagen related a phone call placed to him from Complainant in Kansas City in which an argument ensued over who would take the initiative to get an air bag on Complainant's trailer fixed. According to Hagen, Complainant ultimately agreed to get the air bag fixed, but then slammed the phone down in Hagen’s ear (Tr. 401).

On March 10, 2000, Complainant faxed a memo to Ristvedt accusing Respondent of denying Complainant an accommodation for a physical disability and attempting to take advantage of Complainant's mental disability. The basis for the accusation was an asserted attempt to change Complainant's regular dispatch route to assure that he would not get home during February. Complainant's memo warned that the attempt to make him quit would not work because he has an obsessive disorder which would not allow him to quit “no matter how much you punish me, financially, physically or mentally.” The memo also accused Ristvedt of sending him on dispatches in February which could not be legally logged, and with bald tires. Complainant ended the memo by stating, “I will stay with your equipment even if I have to panhandel (sic) and beg for my sustenance (sic). I hope the truck driver from Fargo will not recognize me as I will be doing this at truckstops where my plight will be recognized” (CX 24).

Ristvedt testified that Respondent has nothing to do with dispatching the drivers, that the authority to dispatch the drivers belongs to Sheyenne Transport (Tr. 342). He denied interfering with Complainant's dispatches (Tr. 355).

The abusive and antagonistic attitude expressed by Complainant toward Respondent is a legitimate reason for the termination of the Complainant's employment. Ristvedt and Hagen testified that the inconsistent driving was a minor reason for firing Complainant (Tr. 370, 406). In all likelihood, Complainant would not have been fired had it not been for the attitude he expressed toward his Employer.

Poor Care of Vehicles

The remaining two reasons presented by Respondent for Complainant's dismissal, the truck being filthy and being low on oil, were not part of Hagen's reasoning when he decided to fire Complainant. Hagen testified that when Complainant returned the truck to Fargo Freightliner on March 20, 2000 the truck was very dirty and was low on oil. Hagen remarked to Complainant that the truck was filthy and looked like it had never been cleaned. (CX 30, Tr. 403). However, Hagen admits that he had intended to fire Complainant three days earlier, on Friday, March 17, 2000, but Complainant dropped off his truck and left before Hagen could meet with him (Tr. 412). On March 17, Hagen would have had no knowledge of the condition of the truck or whether it was low on oil. On March 20, 2000, when Hagen and Ristvedt discovered that the truck was dirty and low on oil, they might have regarded the truck's condition as an additional or corroborative reason for the firing, but on the prior Friday when Hagen intended to fire Complainant, he was unaware of the condition of the truck.

Respondent has produced evidence of legitimate non-discriminatory reasons for the termination of Complainant's employment. Complainant retains the ultimate burden of establishing that his job was terminated because he engaged in protective activity, that is, because he reported the maintenance and safety problems with his vehicle to the Respondent or because he refused to drive more miles than permitted under Department of Transportation regulations. However, the record does not support Complainant's argument. When Complainant reported a problem steps were taken to fix it. The truck was in the shop for repairs from October 5 to October 9, 1999 and again on October 24, 1999 (Tr. 273). Both Ristvedt and Hagen testified that the cost of the repairs reported to be needed by Complainant for his vehicle were not out of line for a truck of its age and use (Tr. 357, 398).

Many of the Complainant's concerns relate to bare tires, but Hagen testified that if a driver had ever reported to him a tire with steel belts showing, he would have it replaced; if the truck was on the road the tire would be replaced on the road. (Tr. 385, 386) In fact, a complete set of tires were installed on the Complainant's truck sometime between September, 1999 and February, 2000⁴ (Tr. 268).

Complainant recorded a November 15, 1999 telephone conversation with Ristvedt during which Ristvedt expressed concern with whether Complainant was able to drive the truck. The purpose of the conversation was Ristvedt's questioning of Complainant about prior trips as Complainant's hand writing on his written reports was illegible. During the conversation, Complainant expressed concern over the steering on his tractor pulling to the right and exacerbating a back ailment that he suffered. Ristvedt responded by questioning whether Complainant could drive. "Well, I mean is it okay for you to drive. I mean should you be driving?" Later in the conversation Ristvedt stated in effect that it was only common sense to fix steering that was out of alignment (CX 12, p.3, 4). The attitude expressed by Ristvedt during the conversation is not one of a person who is unconcerned about the safe condition of

⁴The new tires were removed from the truck about a month later. The replacement set are described by the Complainant as "pretty good used ones" (Tr. 268)

a vehicle or its driver, or is unwilling to provide necessary repairs. There may have been some disputes between Complainant and Ristvedt over whether a problem existed, or its severity, for example the U-joint or steering, but Ristvedt had the problems checked by its mechanics or otherwise taken care of. In fact, the U-joint was replaced and the steering was re-aligned (Tr. 158, 169).

The exhaust leak from under the cab that was discovered by the Complainant soon after being assigned the truck was repaired, apparently almost immediately upon being discovered⁵ (Tr. 122).

Complainant asserts that one of the reasons that he was fired was that he refused or was unable to drive 12,000 miles a month as instructed by Ristvedt during an August of 1999 meeting and again during a telephone conversation on September, 1999. Complainant testified that he could not drive 12,000 miles a month and still comply with the driving limitations of the DOT regulations, and therefore he had to falsify his logbooks (Tr. 163).

Ristvedt denies ever requiring Complainant to drive 12,000 miles a month, (Tr. 346, 347) and Complainant's testimony to the opposite is not corroborated by the record. Rather, the record supports Ristvedt's testimony that he told Complainant when he was hired that he needed to average 10,000 miles a month (Tr. 344).

Complainant testified that he audio taped all of his conversations with Ristvedt and Hagen. None of the taped conversations supports Complainant's testimony that he was instructed to drive 12,000 miles per month. The telephone conversation between Ristvedt and Complainant on December 21, 1999 is the only one that discusses Complainant's mileage. The substance of the conversation was Ristvedt's expression of dissatisfaction with the number of miles that Complainant was driving, in that during November Complainant had driven only 8729 miles and by the end of December only 8025 miles. Ristvedt stressed that Respondent could not operate a truck and trailer and turn a profit on 8,000 some miles per month, and that Complainant could legally drive many more miles than he had been driving. When Complainant asked how many miles, Ristvedt answered that 600 miles could be legally logged in a day running west in light of the 70 mile per hour speed limit but much less driving east because of the lower speed limit of 55 mile an hour (CX 18). The answer implicitly recognizes that drivers could not average 12,000 per month, particularly since some states have a speed limit under 70 miles per hour.

Complainant agrees that neither Ristvedt nor Hagen told him to falsify his logs, nor put any pressure on him to do so. Complainant never told Ristvedt or Hagen that he was falsifying his logs. (Tr. 264, 265) Moreover, Complainant testified that he falsified his logs both before and after he purportedly was told to increase his mileage to 12,000 miles per month. During cross examination,

⁵Complainant also reported an exhaust leak from the manifold. The record is unclear about its disposition.

Complainant was questioned about a period of time covered by his driving logs when he had significant non-driving time so that there would not have been any reason to falsify his logs to disguise actual driving time. Complainant answered that he had nonetheless falsified the logs, out of force of habit. (Tr. 239-241).

The weight of the evidence does not establish that the Complainant was fired because of a refusal to drive 12,000 miles per month, requiring the falsification of his log books. Rather, the evidence supports a finding that Respondent's expectation was an average of 10,000 miles per month, and there is no showing that driving 10,000 miles per month would require the falsification of log books. Complainant's mileage was criticized by Respondent during the December, 1999 meeting when his driving level dropped to a little over 8,000 miles per month. In as much as Complainant's driving increased to an acceptable level in January and February, 2000, of over 10,000 miles, and Ristvedt and Hagen testified that the inconsistent performance was a lessor reason for the Complainant's termination, it is likely that the Complainant would not have been fired without his abusive manner and attitude toward the Respondent.

Accordingly, it is determined that the Complainant has not shown by a preponderance of the evidence that his termination from employment by Respondent on March 20, 2000 was the result of protective activity, that is, was the result of his complaints of the condition of his vehicle, or his refusal to drive more miles than permitted by the DOT regulations. The complaint of Gerald Fish is dismissed.

RECOMMENDED ORDER

It is hereby Recommended that the complaint by Gerald Fish against Ristvedt under Section 405 of the Surface Transportation Assistance Act be dismissed.

THOMAS M. BURKE
Associate Chief Judge

NOTICE: This Recommended Decision and Order and the administrative file will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington D.C. 20210. See 29 C.F.R. §§ 1978.109 (a); 61 Fed. Reg. 19978 and 19982 (1996).